U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 06 December 2006

BALCA Case No. **2006-INA-50**
ETA Case No. P-05129-00306

In the Matter of:

STAR SERVICE AUTO BODY AND REPAIR,
Employer,

on behalf of

VICTOR MANUEL ZAPATA,
Alien.

Certifying Officer: Barbara Shelly
Bala Cynwyd, Pennsylvania

Appearance: Josefina Alonso Pujol, Esquire
Jackson Heights, New York
For the Employer and the Alien

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On April 17, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Diesel Mechanic. (AF 39). The Employer subsequently requested conversion to processing under the "Reduction in Recruitment" (RIR) procedure. (AF 46).

On February 16, 2006, the CO issued a Notice of Findings (NOF) stating an intent to deny the application unless the Employer rebutted two proposed grounds for denial: (1) failure to offer the prevailing wage, and (2) failure to provide a written report of all of the employer's pre-application recruitment efforts. In regard to the prevailing wage issue, the CO instructed the Employer to amend the ETA 750 and to post the new wage offer at its work site. In regard to the RIR report, the CO instructed the Employer to submit its report showing (a) each recruitment source, (b) the number of U.S. workers who responded, (c) the names, addresses and resumes/applications of U.S. applicants, (d) the job title of the person who interviewed the applicants, and (e) the lawful job-related reasons for not hiring each U.S. applicant.

In its rebuttal, the Employer amended the prevailing wage offer on the ETA 750. (AF 16) The Employer also stated that it posted a "Notice of Vacancy" from February 23, 2006 to March 10, 2006 in conspicuous place in its premises, and that no applicants inquired about the position. (AF 25). The rebuttal included a copy of the Notice. (AF 26). The rebuttal, however, was silent about the requested documentation of its pre-application recruitment.

On May 23, 2006, the CO issued a Final Determination denying certification because the rebuttal failed to provide any information about pre-application recruitment, and only included the results of an internal posting at the worksite, and nothing about a newspaper advertisement. (AF 21-22).

Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

By a filing dated April 17, 2006, the Employer requested BALCA review. (AF 2-6). The Employer argues that the NOF had instructed that the Employer not advertise on its own. Thus, the ground stated in the Final Determination for denial based on failure to submit a newspaper advertisement was allegedly in error. The Employer's attorney argued that "[t]he prospective employer complied with the items requested in said 'Corrective Action', which were only the increase and amendment of the salary offered to the applicant, the placing of the Notice of Vacancy and the report regarding said Notice of Vacancy." (AF 4).

BALCA docketed the appeal on August 8, 2006, and issued a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on August 10, 2006. The Notice provided 21 days to submit a Brief.

By mailing postmarked October 21, 2006, the Employer's attorney submitted a letter to the Board stating that despite the Board's briefing order "there was no reason for the undersigned to file a brief, because the appeal was self explanatory." The attorney nonetheless argued again that the CO had instructed the Employer not to advertise on its own, and submitted as an exhibit a copy of the NOF with the relevant language highlighted by a yellow marker. That highlighted language, however, was in the portion of the NOF that spoke to the prevailing wage issue rather than the portion of the NOF that directed submission of the documentation supporting the RIR.

DISCUSSION

Section 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*). If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, *STLO Corporation*, 1990-INA-7 (Sept. 9, 1991); *Oconee Center Mental*

Retardation Services, 1988-INA-40 (July 5, 1988), especially where the employer does not justify its failure. *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991).

Twenty C.F.R. § 656.21(i) provides that a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it adequately tested the labor market with no success at least at the prevailing wage and working conditions prior to filing the labor certification application. A CO's decision whether or not to grant a RIR is gauged under an abuse of discretion standard. *Solectron Corp.*, 2003-INA-144 (Aug. 12, 2004).

In this case, the Employer's appellate brief was not timely. However, it merely reiterates the same argument made in the request for BALCA review – namely that the CO had given instructions to the Employer not to re-advertise without further contact by the CO.

The flaw with the Employer's position is that the CO's instruction not to re-advertise without further contact by the CO was in reference to the prevailing wage issue and was **irrelevant** to the question of pre-application documentation to support the RIR conversion request. The NOF expressly directed the Employer to submit its documentation in support of the RIR. The Employer ignored this direction. The Employer apparently misconstrued the NOF instruction to post the job at the work site with the new prevailing wage as somehow related to the RIR documentation issue. Although the Final Determination was slightly indirect, we have reviewed the NOF and find that it was not ambiguous or confusing about the instruction to submit a recruitment report detailing the Employer's pre-application recruitment efforts. Any misunderstanding about the nature of what needed to be included in the rebuttal was the fault of the Employer and its attorney and not the CO. Based on the Employer's rebuttal, it is not even known whether the Employer did **any** pre-application recruitment, let alone what sources it used for recruitment, whether any U.S. worked applied, and whether any such applicants were lawfully rejected.

In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. When, however, the Employer fails to comply with a lawful

instruction of the CO during consideration of the RIR request, this panel has declined to order a remand but instead affirmed the denial of certification. *See, e.g., Houston's Restaurant*, 2003-INA-237 (Sept. 27, 2004) (failure to comply with a deadline set by the CO). We hold that where, as here, the CO unambiguously directs the submission of documentation to support a request for conversion of the application to RIR processing, and the Employer fails to provide any documentation responsive to that direction, the Employer's lack of cooperation with the CO is grounds supporting an outright denial of the application. Thus, we affirm the CO's denial of certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.